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In The
Supreme Court of the United States

No. 75-380

SEABOARD COAST LINE RAILROAD COMPANY, a corporation,

Petitioner,

-vs-

JONATHAN W. DIXON,

Respondent.

PETITIONER'S REPLY BRIEF

GEORGE D. GABEL, JR.
Wahl and Gabel
405 Florida Title Building
Jacksonville, Florida 32202

Counsel for Petitioner

JAMES E. WILLIAMS
500 Water Street
Jacksonville, Florida 32202

Of Counsel

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The Response avoids the thrust of the Petition for Writ of Certiorari, which raises an important constitutional issue. Respondent has placed his reliance primarily upon the argument that Petitioner should have directed the writ to the trial court rather than the District Court of Appeal. Petitioner suggests that Respondent's omission of any significant argument against the points raised is a tacit admission of the correctness of Petitioner's position; and a tacit admission that if the writ is properly directed to the District Court of Appeal it most likely should be granted.

A. *The Petition for writ of certiorari was properly directed to the District Court of Appeal.*

The trial court denied petitioner's motion to dismiss under

the doctrine of forum non conveniens. Ordinarily, an interlocutory order such as the one in question would not be appealable since it is not a "final order disposing of the case." The Florida Appellate Rules, however, provide for appeals from interlocutory orders in certain specified instances. See 2 Fla.Jur. *Appeals* §448. One of those specified instances is an appeal from an order "relating to venue." Florida Appellate Rule 4.2 provides in pertinent part as follows:

> "Appeals may be prosecuted in accordance with this rule from . . . interlocutory orders relating to venue or jurisdiction over the person. . . . This rule shall not be construed as limiting or affecting the power of the district courts of appeal or the circuit courts in reviewing any appropriate interlocutory order by common law certiorari."

It is well settled that an order denying a motion for dismissal on the doctrine of forum non conveniens is an interlocutory order "relating to venue" appealable under Rule 4.2, Florida Appellate Rules. See *Southern Railway Company v. McCubbins*, 196 So.2d 512 (Fla., 3d D.C.A., 1967), and *Southern Railway Company v. Bowling*, 129 So.2d 433 (Fla., 3d D.C.A., 1961).

The petition for writ of certiorari filed in the Supreme Court of Florida was denied. As it was entitled to do, that court refused to take jurisdiction of the case. The District Court of Appeal, however, did not refuse to take jurisdiction of the case, nor did it have the opportunity to do so. Review was sought in the District Court of Appeal, not by common law certiorari, but by *appeal*.

On appeal the appellate court acquires jurisdiction of the cause when the notice of appeal is filed. It is not a discre-

tionary acquisition of jurisdiction. Respondent argues that the dismissal of the appeal by the District Court of Appeal indicates a refusal of the appellate court to take jurisdiction of the case. (Respondent's Brief, p. 5). That is not the law in Florida, however. As stated in *General Capital Corporation v. Tel Service Co.*, 212 So.2d 369 (Fla., 2d D.C.A., 1968), at page 382:

> "When a notice of appeal has been timely filed, *jurisdiction* of the cause then *vests absolutely in the appellate Court* until such appeal has been finally disposed of by affirmance, reversal, or *dismissal;* subject only, of course, to a mere temporary relinquishment of jurisdiction for some specified, exceptional purpose, . . . " [Emphasis supplied.]

Since the District Court of Appeal acquired jurisdiction of the cause when the notice of appeal was timely filed and disposed of the appeal by dismissal, the writ of certiorari runs to the District Court of Appeal. In its opinion in dismissing the appeal [A-26, 37; 303 So.2d 39], the District Court of Appeal cited the cases previously decided against Petitioner on the same point of law, *Adams v. Seaboard Coast Line Railroad Co.*, 224 So.2d 797 (Fla., 1st D.C.A., 1969); *Shaw v. Seaboard Coast Line Railroad Co.*, 229 So.2d 275 (Fla. 1st D.C.A., 1970), cert. den. 237 So.2d 540 (Fla. 1970); *Seaboard Coast Line Railroad Co. v. Ford and Britt*, 238 So.2d 473 (Fla. 1st D.C.A., 1970); and *Seaboard Coast Line Railroad Co. v. West*, 242 So.2d 156 (Fla. 1st D.C.A., 1971), cert. den. 246 So.2d 112 (Fla., 1971).

The court also indicated it had considered the case of *Fowler v. Chillingworth*, 94 Fla. 1, 113 So. 667 (Fla., 1927). Having considered the merits of the case (which included

reliance on its prior unconstitutional decisions), the District Court of Appeal dismissed the appeal.

The case of *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1968), cited by Respondent, is inapplicable since it dealt with a discretionary writ of certiorari, not an appeal.

B. *The decision of the state court involved a federal question.*

In Petitioner's motion in the trial court to dismiss under the doctrine of forum non conveniens, Petitioner specifically stated:

> "The Defendant herein respectfully submits that to deny its Motion to Dismiss upon the doctrine of forum non conveniens, the Defendant will be deprived of equal protection of the laws, as guaranteed to it by . . . the Fourteenth Amendment to the Constitution of the United States." [A-12].

The motion was denied, and the trial court stated that "although there are several sound reasons for the application of the doctrine" in this case, the decisions in *Adams v. Seaboard Coast Line Railroad Company*, 224 So.2d 797 (Fla., 1st D.C.A., 1969), and *Shaw v. Seaboard Coast Line Railroad Co.*, 229 So.2d 275 (Fla., 1st D.C.A., 1970, "interdict a judge of this Court from exercising any discretion in the matter." [A-29].

On appeal in the District Court of Appeal, Petitioner raised as one of its assignments of error the following:

> "The denial . . . of the Defendant's Motion to Dismiss under the doctrine of Forum Non Conveniens deprives this Defendant of its constitutional right to equal protection of the laws, as guaranteed by . . . the Four-

teenth Amendment to the Constitution of the United States of America; and said Court is thus in error." [A-34].

The appeal was dismissed in what amounted to a "speedy affirmance." The Petitioner has tried numerous times to have this highly inequitable situation remedied, and has been rebuffed by the courts of Florida on each occasion. In that setting, and in an effort to have the matter presented to this Court for some relief, Petitioner expected the District Court of Appeal to make short work of its appeal. It would be only wishful thinking to expect that court to reverse itself, even though it has been incorrect in its previous holdings. But there is some hope that the highest court in the land may instruct the Florida court in its duties under the United States Constitution.

C. *Florida violates the "equal protection of the law clause" in its application of the forum non conveniens doctrine.*

1. SCL as a Nonresident.

Florida applies the doctrine of forum non conveniens only to *nonresidents*. Seaboard Coast Line Railroad Company (SCL), even though a Virginia corporation, was found in the facts before the District Court of Appeal in *Adams v. Seaboard Coast Line Railroad Co.*, supra, to be a resident of Florida *for all practical purposes*. As such it was not allowed in *Adams*, supra, or in the present case, to apply to the trial court's discretion in order to seek the benefits of the doctrine of forum non conveniens.

The record is clear, however, that the Southern Railway Company is similarly situated as SCL. That railroad company in *Southern Railway Company v. McCubbins*, supra,

was allowed to raise and utilize the doctrine of forum non conveniens. It is significant that not one word of Respondent's Response deals with Petitioner's contention that the two railroads are similarly situated or in like circumstances. Obviously, the argument is a telling one.

2. SCL as a Resident.

Petitioner has argued in its Petition (page 24 *et seq.*) that even if SCL is considered to be a resident of Florida, the distinction made between residents and nonresidents denies to SCL as a resident the equal protection of the laws. Florida is depriving a resident of the right to defend in the courts of Florida upon terms of equality with nonresidents doing business in the state.

Respondent attempts to deal with this argument by paraphrasing the language of Mr. Justice Frankfurter in *Missouri v. Mayfield*, 340 U.S. 1 (1950), stating that the test of constitutionality in the application of the doctrine of forum non conveniens in *Missouri v. Mayfield*, is as follows at 340 U.S. p. 4:

> " 'Residents' and 'nonresidents' may be treated differently under the Constitution, so long as a state does not favor its own citizens."
> (Respondent's Brief, p. 11).

Presumably, Respondent is not representing that to be a direct quote, because that language is not in the case. Mr. Justice Frankfurter actually said as follows at 340 U.S. p. 4:

> "But if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, . . . it is a choice within its own control. . . .

> "But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act *if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially*, . . . "

In the present case, we are not dealing with *access* to the courts, where a resident may be preferred over a nonresident. We are dealing with a local policy that denies a resident the right to raise the doctrine of forum non conveniens in the courts of Florida, even though there is no connection with the forum, including the residence of the plaintiff, but allows a nonresident defendant the benefit of the doctrine. In the case of a nonresident defendant the nonresident plaintiff is required to file his suit where it should have been brought in the first place. Contrary to the position suggested by Respondent's extensive paraphrasing of the language in *Missouri v. Mayfield*, supra, this Court has clearly said in dealing with the question of equal treatment in *Chambers v. Baltimore & Ohio Railroad Company*, 207 U.S. 142 (1907), as follows at pages 148 and 149:

> "The right to sue *and defend* in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. . . .

> "But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies at different times. *But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States.*" [Emphasis supplied.]

It is obvious (and Respondent so admits at page 9 of its Brief) that the policy that the State of Florida has chosen to adopt operates in a different way on its own citizens (denying them the right to use the doctrine of forum non conveniens) and those of other states (whose citizens are allowed to utilize the doctrine). Respondent glibly suggests that SCL is treated just as any other resident. But SCL is not treated in the same way as residents of other states, and therein lies the rub. See 16 Am. Jur. 2d *Constitutional Law* §516, and *Little v. Smith*, 124 Kan. 237, 257 P. 959, 57 A.L.R. 100 (1927).

Respondent argues that 28 U.S.C. §1332(c) disposes of the question. That section, however, deals only with the creation of the lower federal courts and determination of their *jurisdiction*, a matter left entirely to the Congress by Article III of the U. S. Constitution. In that connection this Court said in *Lockerty v. Phillips*, 319 U.S. 182 (1943), at page 187:

> "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from *the exercise* of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, §1 of the Constitu-

> tion. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. . . . The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.' . . . "

In any event, the judicial power of the United States extends *in diversity cases* only to controversies between citizens of different states, and for purposes of jurisdiction "principal place of business" defines that citizenship where corporations are concerned. Florida's courts are not so limited, and citizens of any state can bring suit and defend in Florida. Florida can establish its own policy so long as the litigants, whether residents or nonresidents, are treated the same.

CONCLUSION

The Petition for Writ of Certiorari was directed to the District Court of Appeal, the highest court in which decision could be had, since the discretionary review of the Florida Supreme Court was not invoked, although it was sought.

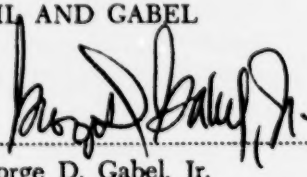
The Petition should be granted. SCL is being denied the equal protection of the laws, whether it is considered as a resident or a nonresident of the State of Florida. The unfairness involved in this case is compounded by the fact that the active tortfeasor/potential third party defendant lives in Georgia, beyond the jurisdiction of the courts of the State of

Florida. Unless this Court grants Petitioner at least the chance for some relief, there will be a trial in Florida of a Georgia case and then a perfectly useless additional trial in Georgia against the industry which caused the alleged unsafe place to work.

Respondent obviously concedes the merit of Petitioner's position, having declined to make a significant response to the equal protection argument. Petitioner prays that the decision of the District Court of Appeal of Florida, First District, be reversed and the case remanded with directions to the trial court to exercise its discretion in the application of the doctrine of forum non conveniens.

Respectfully submitted,

WAHL AND GABEL

By 

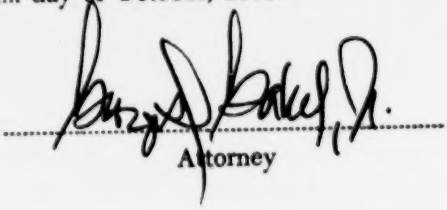
George D. Gabel, Jr.
405 Florida Title Building
Jacksonville, Florida 32202
Attorney for Petitioner

Of counsel:

James E. Williams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was furnished to BECKHAM & McALILEY, 1010 Concord Building, 66 West Flagler Street, Miami, Florida 33130, by U.S. mail, this 20th day of October, 1975.



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